

NTSB Order No. EA-4428

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 20th day of February, 1996

Respondent .

Docket SE-13914

Both the Administrator and respondent have appealed from the oral initial decision of Administrative Law Judge William R. Mullins, rendered at the conclusion of an evidentiary hearing on March 16, 1995.<sup>1</sup> By that decision, the law judge affirmed an order of the Administrator, in part, and reduced the sanction

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from a 90 to a 45-day suspension. The Administrator's order charged respondent with violations of sections 91.13(a), 135.5, 135.63(c), 135.73, and 135.75 of the Federal Aviation Regulations (FAR), 14 C.F.R. Parts 91 and 135.<sup>2</sup>

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<sup>2</sup>The regulations state, in pertinent part:

**§ 91.13 Careless or reckless operation.**

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

**§ 135.5 Certificate and operations specifications required.**

No person may operate an aircraft under this part without, or in violation of, an air taxi/commercial operator (ATCO) operating certificate and appropriate operations specifications issued under this part....

**§ 135.63 Recordkeeping requirements.**

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(c) For multiengine aircraft, each certificate holder is responsible for the preparation and accuracy of a load manifest in duplicate containing information concerning the loading of the aircraft. The manifest must be prepared before each takeoff and must include:

- (1) The number of passengers;
- (2) The total weight of the loaded aircraft;
- (3) The maximum allowable takeoff weight for that flight;
- (4) The center of gravity limits;
- (5) The center of gravity of the loaded aircraft....

**§ 135.73 Inspections and tests.**

Each certificate holder and each person employed by the certificate holder shall allow the Administrator, at any time or place, to make inspections or tests (including en route inspections) to determine the holder's compliance with the Federal Aviation Act of 1958, applicable regulations, and the certificate holder's operating certificate, and operations specifications.

**§ 135.75 Inspector's credentials: admission to pilots' compartment: Forward observer's seat.**

The facts of this case are, for the most part, uncontroverted. On November 24, 1993, respondent was pilot-in-command of a Lear 24, N911KB, a cargo-carrying flight from Sparta, Tennessee to Monroe, Michigan, with a refueling stop in Smyrna, Tennessee. Respondent operated the flight for American Corporate Aviation, Inc., a Part 135 operator. The stop in Smyrna was scheduled to take about 10 minutes. However, two FAA inspectors, Mr. Williams and Mr. Ritchey, decided to conduct a ramp inspection of the aircraft at the Smyrna Airport.

The inspectors approached the aircraft and at least one of them presented his credentials (FAA Form 110A) to respondent, stating that they were going to conduct a ramp inspection.<sup>3</sup> While in the process of completing this ramp check, which took about 40-50 minutes, the inspectors found errors in the load manifest for the flight from Sparta to Smyrna. Specifically, the weight for the crew was incorrect, as was the weight for the

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(a) Whenever, in performing the duties of conducting an inspection, an FAA inspector presents an Aviation Safety Inspector credential, FAA Form 110A, to the pilot-in-command of an aircraft operated by the certificate holder, the inspector must be given free and uninterrupted access to the pilot compartment of that aircraft. However, this paragraph does not limit the emergency authority of the pilot-in-command to exclude any person from the pilot compartment in the interest of safety.

<sup>3</sup>The inspectors maintain that they both identified themselves with the 110A Forms and a business card. (Transcript (Tr.) at 16-17, 31-32.) Respondent testified that only one inspector presented the appropriate credentials (Tr. at 69), while the copilot testified that neither inspector presented his identification to him. (Tr. at 86.)

cargo.<sup>4</sup> Respondent admits that these errors resulted in inaccurate weight and center of gravity computations on the load manifest. It is also undisputed that no IFR (instrument flight rules) flight plan was filed for the flight from Sparta to Smyrna.

Meanwhile, the fixed base operator's fuel trucks arrived and the drivers, under instruction to "top off" the tip tanks, began to refuel the aircraft. Inspector Williams testified that, in this aircraft, filling the tip tanks did not necessarily mean that the fuselage tank would also be full. (Tr. 58-59.) To determine the amount of fuel in the fuselage tank, Inspector Williams asked respondent to turn on the aircraft's master power switch, so that the fuel gauge could be read. Respondent refused, telling the inspectors that he was in a hurry. (Tr. at 47.) Inspector Williams then indicated that, instead, he would perform an en route inspection. Respondent denied the request, however, stating that the aircraft would be over maximum gross weight if it took off with the inspector on board. He did not consider the inspector's suggestion to burn off 200 pounds of fuel before takeoff viable. Respondent walked away from the aircraft and the flight was canceled.

The law judge found that respondent admitted the facts establishing a violation of FAR section 135.63(c), as well as a

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<sup>4</sup>According to their medical certificates, the crew's combined weight should have been recorded as 508 pounds, not 330 pounds. Also, the cargo was approximately 520 pounds, not 330 pounds, as recorded on the load manifest.

residual violation of section 91.13(a), in that he acknowledged that the load manifest was incorrect. On appeal, respondent argues that 1) the error on the load manifest did not cause the aircraft to be operated in a careless manner or result in potential endangerment, and 2) section 135.63(c) does not apply to him because he is not an air taxi certificate holder.

We find respondent's arguments unpersuasive. He was not the Part 135 certificate holder, yet, as pilot-in-command, he was responsible for the accurate completion of the aircraft's load manifest. Carrying an accurate load manifest on board the aircraft is a recordkeeping requirement for which a pilot operating an aircraft under Part 135 rules has been held accountable. See, e.g., Administrator v. Hock, 5 NTSB 892 (1986). In addition, as a person operating an aircraft under Part 135, respondent was required to comply with Part 135 rules.<sup>5</sup>

As for the residual violation, the law judge correctly concluded that operating the aircraft with an inaccurate load manifest was careless, and that the violation of section 135.63 supported a residual 91.13(a) violation. It is established precedent that a violation of an operational regulation supports a finding of a "residual" or "derivative" section 91.13(a) violation. See Administrator v. Haney, NTSB Order No. EA-3832 at

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<sup>5</sup>See section 135.3, which states, in pertinent part that:

Each person operating an aircraft in operations under this part shall -

(a) While operating inside the United States, comply with the applicable rules of this chapter....

4-5 (1993), and cases cited therein. Respondent argues that the inaccurate completion of a load manifest is a mere clerical error, not an operational violation. However, the Administrator's interpretation of the section 135.73 violation as an operational violation is a reasonable one. As argued in his reply brief, "[p]re-flight requirements such as calculating the weight and balance of an aircraft are so crucial that they must be considered an integral part of the 'operation' of the aircraft."<sup>6</sup> Administrator's Reply at 13.

The law judge further found respondent in violation of section 135.5 for operating an aircraft contrary to requirements set forth in the applicable operations specifications by failing to file a flight plan. Respondent argues that no 135.5 violation occurred, even though he did not file a flight plan,<sup>7</sup> because the flight from Sparta to Smyrna fell under one of the exceptions enumerated in the operations specifications.<sup>8</sup> However, the

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<sup>6</sup>It also should be noted that FAR section 135.63 is found in Subpart B entitled "Flight Operations."

<sup>7</sup>Respondent admitted in his answer to the complaint that he did not file a flight plan.

<sup>8</sup>The operations specifications issued to American Corporate Aviation, Inc., state that all turbojet airplane flights conducted under Part 135 must be operated under IFR. (Ex. A-12.) A flightcrew may accept a visual approach if VFR weather conditions exist, and the flight is in controlled airspace, under the control of an ATC facility, remains in VFR conditions, and is operated within 35 nautical miles of the destination airport. Id. A flightcrew may cancel an IFR flight plan if VFR conditions exist and

(1) the flight is operated within the TCA, ARSA, or TRSA associated with the destination airport; remains within controlled airspace or an airport traffic area; is

operations specifications require flights operated under Part 135 to be conducted IFR, and that includes filing a flight plan. See 14 C.F.R. 91.173.<sup>9</sup> The exceptions only apply to accepting a visual approach or canceling a flight plan.

With respect to the section 135.73 and 135.75 charges, the law judge found that the Administrator did not prove the violations by a preponderance of the evidence. He determined that, although the inspectors' request to have respondent turn on the aircraft's master switch was reasonable, respondent's subsequent refusal was also reasonable. He further found the request to perform an en route inspection was unreasonable since, in order to take off with Inspector Williams on board, respondent would have had to burn off 200 pounds of fuel before takeoff.

On appeal, the Administrator argues that the mistakes in the load manifest led the inspectors to justifiably question how much

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radar monitored by ATC; and the flightcrew is in direct communication with the appropriate ATC facility; [or]

- (2) The flightcrew is in direct communication with an air/ground communication facility which provides airport traffic advisories and at least one of the following additional conditions are met:

- (a) The flight is operated within 10 nautical miles of the destination airport.
- (b) Visual reference with the landing surface is established and can be maintained throughout the approach and landing.

Id.

<sup>9</sup>Section 91.173 states that "[n]o person may operate an aircraft in controlled airspace under IFR unless that person has ... [f]iled an IFR flight plan."

fuel was on board and whether the aircraft was preparing to take off over gross weight. Based on those concerns, they sought to check the fuel gauge and, consequently, asked respondent to turn on the master power switch. By refusing, the Administrator continues, respondent prevented the inspectors from completing the inspection, in violation of sections 135.73 and 135.75. After reviewing the record and briefs, we are constrained to agree.

The request was a reasonable and simple one. Inspector Williams testified that the FAA's general policy is to refrain from entering an aircraft or manipulating its controls without the operator's or owner's permission. (Tr. at 96-97.) Respondent replies that he is not required by the regulation to assist the FAA in its inspection. At the same time, his refusal to comply with a simple, unburdensome request could fairly be construed as a withholding of authority to accomplish a task that was necessary to complete the inspection.<sup>10</sup> In any event, it is not reasonable to expect that after respondent refused to actuate the master power switch, Mr. Williams, in apparent defiance of

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<sup>10</sup>Respondent testified that it would have taken him a "couple of seconds" to turn on the master power switch. (Tr. at 80.)

Counsel for the Administrator asked him,

[W]asn't it a reasonable thing to do, both for the inspectors' request and for your own information about your aircraft, [to] turn on the master [switch] and make sure that your trunk tank wasn't going to put you over balance, wasn't that reasonable?

Respondent replied, "[i]t would be reasonable, for me to do, yes." Id.



respondent's wishes and without his consent, would reach over and turn on the switch himself. In our view, the request was comparable to a request to see the operations specifications or the load manifest. By refusing, respondent did not "allow" the inspection to be completed and denied the inspectors free and uninterrupted access to the pilot compartment, in violation of sections 135.73 and 135.75.

The basis for the law judge's conclusion that it was unreasonable for the Administrator to expect respondent to burn off 200 pounds of fuel so that Inspector Williams could perform an en route inspection is far from clear on this record, but it appears to reflect a belief that 200 pounds of fuel represented a significant amount relative to the aircraft's total fuel capacity.<sup>11</sup> We do not believe such a concern to be especially relevant where, as here, the expense to the carrier, assuming it had to absorb the cost of the fuel, would be minimal, and there was no suggestion that the flight could not be safely made without the fuel that would have to be burned off to accommodate the weight of the inspector. In any event, after discovering the errors in the load manifest and knowing that the fuel had been topped off, Inspector Williams was understandably concerned that respondent's aircraft was over gross weight, with or without him aboard.<sup>12</sup> Based on his concern, he wanted to see the fuel gauge

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<sup>11</sup>Figuring that a gallon of fuel weighs approximately six pounds, 200 pounds of fuel would amount to about 33.3 gallons.

<sup>12</sup>He also knew that Smyrna had the least expensive fuel in the area, as much as a dollar less per gallon. (Tr. at 46.)

to determine how much fuel was on board the aircraft. When respondent refused to actuate the master power switch, he decided that an en route inspection was necessary to ascertain the amount of fuel in the fuselage tank.<sup>13</sup> In these circumstances, we cannot find that the fact that some fuel *might have had to be burned off* so that the inspector could be carried excused the respondent from his obligation under FAR sections 135.73 and 135.75 to allow the en route inspection and to give the inspector free and uninterrupted access to the pilot compartment of the aircraft.

Regarding sanction, respondent argues that any sanction imposed should be mitigated or eliminated because the inspectors acted contrary to FAA policy and interfered with his preflight duties. His reasoning is faulty, however, as the inspectors' performance of a ramp inspection does not constitute interference. If respondent could not concentrate on his preflight duties while the inspectors were in the aircraft, then he was obligated to wait until they were finished before turning to those duties. Furthermore, while it appears that both sides may have become impatient with one another, the evidence does not

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<sup>13</sup>In addition, it was respondent's refusal to turn on the master switch that led to Inspector Williams' decision to perform an en route inspection, a request which respondent then denied. Respondent's argument that the request was unreasonable and that his actions were motivated by safety concerns is not persuasive, especially since the en route inspection would not have been necessary had respondent simply turned on the master power switch. See similarly, Administrator v. Flowers, NTSB Order No. EA-3842 (1993). Respondent did not attempt to help solve the problem, but chose instead to just walk away from the inspector.

show that the inspectors acted in a manner that would warrant mitigation.<sup>14</sup> The violations support the sanction sought by the Administrator and we will reinstate the 90-day suspension of respondent's Airline Transport Pilot (ATP) certificate. See Exhibit A-2, Excerpt from the Administrator's Sanction Guidance Table, Order 2150.3A, Appendix 4.

Lastly, respondent argues that, because the Administrator suspended only his ATP certificate, a commercial pilot certificate must be issued to him simultaneously with any suspension.<sup>15</sup> The Administrator maintains, and we agree, that suspension of an ATP certificate "suspends all levels of the certificate and all ratings at those levels, leaving the airman with no pilot certificate." Administrator's Reply Brief at 26. Only an order that specifically refers to suspension of the "airline transport privileges" of a pilot's ATP certificate would

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<sup>14</sup>See Administrator v. Reeves, 6 NTSB 96, 102 (1988), where we found that, although the FAA inspections at issue "left something to be desired," the FAA's conduct was not at issue and did not have a direct bearing on the issue of respondent's qualifications.

Respondent also alleges that he was denied due process because his employer has commenced litigation against the FAA and the two inspectors involved in his case and, as such, a prior antagonistic relationship existed between the inspectors and him. We find this argument, at most, frivolous, as no evidence to support the claims was introduced.

<sup>15</sup>The Notice of Proposed Certificate Action, dated May 17, 1994, proposed the suspension of respondent's ATP certificate. However, the suspension order, dated November 30, 1994, ordered the suspension of any pilot certificate held by respondent, including his ATP certificate. At the hearing, counsel for the Administrator agreed to amend the suspension order to conform to the notice.

allow an airman to retain his airman certificate. See, e.g., Administrator v. Dufresne, 3 NTSB 4090 (1981) (revocation of the respondent's ATP privileges and 9-month suspension of his remaining airman certificate and ratings). There is no indication in the record that the Administrator agreed to suspend only respondent's airline transport privileges of his ATP certificate.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal is granted;
2. Respondent's appeal is denied;
3. The Administrator's order is affirmed; and
4. The 90-day suspension of respondent's airman certificate shall begin 30 days after service of this order.<sup>16</sup>

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT and GOGLIA, Members of the Board, concurred in the above opinion and order.

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<sup>16</sup>For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).